UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STEVEN A. ROBERTSON, KEITH PRIOLEAU, KEVIN W. SANDERS, MELVA C. JOHNSON, BEVERLY B. ROBINSON, SYLVIA HOWARD, AND HARRY LEAPHART, III, Individually and as Class Representatives, Plaintiffs,	
-against-	**No. 3:97 CV 1216 (GLG)**
SIKORSKY AIRCRAFT CORPORATION, Defendant.	**DECISION**

Magistrate Judge Garfinkel submitted a recommended ruling **[Doc. # 94]** on the Plaintiffs' Motion for Class Certification **[Doc. # 81]** recommending that class certification be denied. The plaintiffs have submitted lengthy objections **[Doc. # 97]** to the recommended ruling to which the defendant has responded. After careful consideration, the Court adopts as its own the recommended ruling of the Magistrate. However, in light of the various objections submitted, the Court renders this Decision addressed to the plaintiffs' objections.

DISCUSSION

I. Rule 23(a), Fed. R. Civ. P.

A substantial portion of the plaintiffs' objections are addressed to the requirements of Rule 23(a), Fed. R. Civ. P., and the failure of the Magistrate Judge to come to any

conclusions thereon.[1] Rule 23 mandates that a party seeking class certification must satisfy the four requirements of Rule 23(a), numerosity, commonality, typicality, and adequacy of representation, as well as the requirements of one of the three subsections of Rule 23(b). See Marisol A. v. Giuliani, 126 F.3d 372, 375-76 (2d Cir. 1997). There is no requirement in Rule 23 or in the jurisprudence of this Circuit that the trial court must first consider section (a) before addressing section (b). Nor is there any requirement that section (a) be addressed at all, once the court has determined that the requirements of section (b) have not been met.

It may well be that the Magistrate Judge skirted the issues raised under Rule 23(a) because of his "serious reservations" as to whether plaintiff had satisfied the "commonality" requirement, although he acknowledged recent Second Circuit precedent holding that the commonality requirement may be satisfied based on statistical evidence. See Recommended Ruling at 9 & n.1. The

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[1] Plaintiffs strenuously object to the Magistrate Judge's failure to consider "one iota of the statistical and anecdotal evidence that plaintiffs submitted in this case." Pl.'s Obj. at 6 (original emphasis). Plaintiffs are incorrect in their assumption that Magistrate Judge considered only the allegations of the complaint or that he erred in this regard. See, e.g., Recommended Ruling at 7 (noting that the court may consider material outside the pleadings), at 9, n.1 (referencing plaintiffs' statistical evidence and defendant's rebuttal to this evidence). However, as discussed above, because the Magistrate Judge found that plaintiffs were unable to meet the criteria of any of the subsections under Rule 23(b), he ultimately found it unnecessary to rule on the issues presented under Rule 23(a).

majority decision in Caridad v. Metro-North Commuter Railroad, 191 F.3d 283 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000), recognized the relevance of statistical evidence in cases challenging subjective decision-making processes. The challenged employment practices in Caridad, like the instant case, turned substantially upon subjective assessments by various supervisory personnel. In Caridad, after noting that less deference is afforded to a district court's decision denying class status than one certifying a class, id. at 291, the Second Circuit held that "[w]here the decision-making process is difficult to review because of the role of subjective assessment, significant statistical disparities are relevant to determining whether the challenged employment practice has a class-wide impact." Id.[2]

In the instant case, plaintiffs did, in fact, submit an expert's statistical report and defendant responded with its own statistical evidence. The Magistrate Judge noted defendant's argument that plaintiffs' expert's report was flawed because she had failed to control for factors such as cross-departmental

[2] In his dissent, now Chief Judge Walker, stated that "[a]s a matter of law, I cannot agree with the majority that Metro-North's practice of delegating personnel decisions - plaintiffs prefer to call it 'over delegation' - constitutes a policy or practice sufficient to satisfy the commonality requirement of Rule 23(a)." Caridad, 191 F.3d at 296. He further admonished the district court for having considered the parties' expert reports at the class certification stage, which he felt went to the merits of the case, not to the propriety of class certification. Nevertheless, he agreed with the district court that plaintiffs had failed to satisfy Rule 23(a)'s commonality and typicality requirements. Id. at 297.

differences in promotional eligibility. However, in light of the majority's admonition in Caridad that motions for class certification are not the appropriate vehicle for "statistical dueling," id. at 292, he never reached the merits of defendant's challenge to plaintiffs' expert's statistical analysis. Instead, recognizing that he might not need to address the question of whether plaintiffs had carried their burden under Rule 23(a) depending on the outcome of his Rule 23(b) analysis, he turned to the question of whether the plaintiffs' case satisfied one of the available subsections under Rule 23(b).

In that regard, it should also be noted that in Caridad the majority remanded the case to the district court to determine whether the requirements of Rule 23(b) were met, a matter which the district court had not reached. Id. at 293. On remand, in a decision issued after the Magistrate Judge's recommendation in this case, the district judge concluded that the case did not qualify for class certification under Rule 23(b)(2) or (b)(3). Robinson v. Metro-North Commuter Railroad Co., 197 F.R.D. 85 (S.D.N.Y. 2000). The Judge noted that it has long been the rule in this Circuit that subsection (b)(2) was not intended to cover cases where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominately injunctive or declaratory. Id. at 87 (citing Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968), vacated on other grounds, 417 U.S. 156 (1974)); see Discussion of

Rule 23(b)(2), infra. Finding that the "multiple individual determinations of damages for the numerous members of the class here proposed would overwhelm class-wide injunctive issues," id. at 88, he denied certification pursuant to Rule 23(b)(2). Turning to plaintiffs' alternative request for certification under subsection (b)(3), he found that questions of fact affecting individual members of the class -- such as whether a given individual was individually discriminated against by an individual department manager, thereby suffering individualized injuries, compensable by individual money damages -- vastly predominated over any common questions of law or fact. Id. at 89. He concluded that "‹the difficulties likely to be encountered in the management of a class action in this case are very considerable and fraught with peril to the individual rights of plaintiffs and defendants alike." Id.

Like the Magistrate, we have sincere doubts as to whether this case qualifies under Rule 23(a). The centerpiece of the plaintiffs' case is the statistical analysis made by their expert which starts with the belief, undoubtedly correct, that the performance reviews are the central considerations for pay increases or promotions. Plaintiffs' expert then analyzes the promotions and finds that blacks are not being promoted at the same rate that whites are. The defendant does not agree with this analysis. It argues that it is not statistically significant but, for our purposes at this juncture, the Court has

to assume that, statistically, plaintiffs are correct.

Plaintiffs' expert may be correct mathematically, but the assumption behind her conclusions is flawed. The assumption is that any time one racial group does not fare as well as another in any sort of situation, the explanation must be discrimination. There is no scientific basis for that. Such a claim would come as a great surprise to black athletes who have dominated most professional sports (as well as many amateur ones) based upon their superior performance. They would be astonished to learn that this must be an indication that there is bias against whites. As the distinguish black columnist and economist, Thomas Sowell, has written in a recent column, Imbalanced Notions of 'Equality', The Washington Times, March 6, 2001, at A17:

> Scientists who study the brain say that some abilities develop greatly at the expense of other abilities. Socially as well, some talents are developed by neglecting others. . . .
>
> But if people differ radically in performance, why is it surprising that they also differ radically in the rewards they receive? And if we are determined to equalize, can we equalize upward or only downward? Can you make a mediocre golfer another Tiger Woods or only penalize Tiger Woods for being better?

The plaintiffs' expert says that she has controlled for all variables such as education, years with the company, etc., but the dispute here concerns primarily subjective performance evaluations by numerous supervisory personnel, and there is no

way she can control for differences in performances by individual employees or various supervisors' evaluations thereof.

There is another unusual factor to the plaintiffs' expert's approach and its application to this case. The expert states on page 2 of her report that for the four-year period at issue, eight more blacks should have been promoted than were in fact promoted. If the original seven named plaintiffs prove their claims, there is only one promotion lacking for these four years. That one promotion surely cannot be given to each member of the proposed class. The expert also concedes that economists expect compensation to vary with the productivity of workers. She acknowledges that production that is not directly observed is difficult to measure. Exp. Rep. at 7-8. She then asserts that experience (tenure) and education are factors making persons more productive, but goes on to argue that any other compensation differences that cannot be explained by these factors are suspect. She concludes that, after taking into account productivity, economists attribute any differences to discrimination. Productivity is precisely what the evaluations are intended to determine, and these evaluations relate to both promotion and salary increases.

Plaintiffs, however, point to the "excessive subjectivity" of the performance evaluations. Undoubtedly they do have subjective aspects. It is unavoidable when dealing with upper level or professional positions. Whether such subjective

evaluations are permissible and whether they are fairly and evenly exercised are highly dependent on the nature of the position at issue. The reasonableness of subjective determinations varies significantly from upper-level or professional positions to lower-level technical or clerical positions. "[S]ubjective criteria necessarily and legitimately enter into personnel decisions involving supervisory positions." Risher v. Aldridge, 889 F.2d 592, 597 (5th Cir. 1989). As the Eleventh Circuit recently observed:

> subjective evaluations of a job candidate are often critical to the decisionmaking process, and if anything, are becoming more so in our increasingly service-oriented economy. . . . Personal qualities . . . factor heavily into employment decisions concerning supervisory or professional positions. Traits such as "common sense, good judgment, originality, ambition, loyalty, and tact" often must be assessed primarily in a subjective fashion, yet they are essential to an individual's success in a supervisory or professional position.
> . . . .
> It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation.

Denney v. City of Albany, 247 F.3d 1172, 1185-86 (11th Cir. 2001) (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988)). In short, "an employer's reliance upon legitimate, job-related subjective considerations" should not raise a "red flag" because it does not "suggest[ ] in its own right an intent to

facilitate discrimination." Id. (emphasis added); see also Reap v. Continental Casualty Co., 199 F.R.D. 536, 544-45 (D.N.J. 2001); Ramirez v. Hofheinz, 619 F.2d 442, 446 (5th Cir. 1980) (holding that supervisory qualifications require subjective evaluation); Ross v. William Beaumont Hosp., 678 F. Supp. 655, 678 (E.D. Mich. 1988) ("Courts have traditionally shown greater deference to subjective job appraisals in the context of 'white collar' or professional positions . . . because such positions tend to be more difficult to evaluate in a more objective quantitative fashion than 'blue collar' jobs." (citations omitted)). If we were dealing with low level workers doing routine, manual labor, we might well be able to measure their performance mathematically based upon production statistics. This cannot be done with supervisory and professional positions such as are involved in this case.

We are also troubled by the Caridad majority's belief that statistical evidence can in all situations detect racial discrimination in an employer's work force. See 191 F.3d at 292. Except for jobs requiring no particular skills, or applications for positions that do not demonstrate qualifications, comparisons between the an employer's work force and the general population are generally recognized as inappropriate comparisons. See, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651 (1989)(holding that racial imbalance in one segment of employer's work force does not, without more, establish a prima facie case

of disparate impact under Title VII); Gay v. Waiters' and Dairy Lunchmen's Union, 489 F. Supp. 282, 307 (N.D. Cal. 1980), aff'd, 694 F.2d 531 (9th Cir. 1982). As a recent article on employment law in the National Law Journal, Use and Misuse of Statistics, by Jay W. Waks and Gregory R. Fidlon, April 9, 2001, states:

> The typical theory advanced by plaintiffs is that discrimination exists when the observed representation of female, minority or older workers in the employer's workforce is lower than the representation that would be expected if employment decisions were made randomly with respect to sex, race or age. This theory, however, is based on faulty logic, which one commentator has termed the "statistical fallacy" or "transposition fallacy."
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> The fallacy is the assumption that statistical analyses can reveal the probability that an observed workforce disparity was produced by chance; whereas, in reality, statistical tests merely provide the probability of a certain observed disparity when randomness, or chance, is assumed. They do not and cannot say anything about causation. Nevertheless, . . . this mistake has been made by numerous courts, statistical expert witnesses and both legal and statistical commentators.
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> Finally, even assuming that a plaintiff demonstrates a statistically significant probability that a given outcome is not due to chance, such a showing is insufficient by itself to prove that unlawful discrimination is the cause. Significant disparities in the workplace may result from a variety of other, nonrandom causes. For example, different sex, race and age groups may display very difference interests in certain jobs.

Id. at B8 (internal citations omitted).

Clearly, if there is a common cause or an identifiable

practice discriminatorily impacting on a company-wide employment system, that can be challenged. Plaintiffs' statistical evidence, however, is not directed at any actual employment policy or practice. Instead, what we have here are evaluations and decisions made by hundreds of supervisors and managers on a variety of things besides promotions, such as job assignments, salary determinations, merit increases, etc. From a practical standpoint it is impossible to put these all under one roof.

The only similarity between the named plaintiffs and the proposed class is that they are all black and the plaintiffs claim that they were all denied promotions, pay increases or assignments, etc., to which they were entitled. The only allegation of any company-wide discriminatory practice is the claimed failure of the company to make sure that all of these decisions involving performance did not have a disparate impact upon blacks. The fact that a particular named plaintiff is a member of the same race as the proposed class does not establish his standing to litigate all possible claims of discrimination on behalf of the class merely because they have a common employer. As the Supreme Court held in General Telephone Co. v. Falcon, 457 U.S. 147 (1982),

> [c]onceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that

> individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For respondent to bridge that gap, he must prove much more than the validity of his own claim. Even though evidence that he was passed over for promotion when several less deserving whites were advanced may support the conclusion that respondent was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of petitioner's promotion practices, (2) that petitioner's promotion practices are motivated by a policy of ethnic discrimination that pervades petitioner's Irving division, or (3) that this policy of ethnic discrimination is reflected in petitioner's other employment practices, such as hiring, in the same way it is manifested in the promotion practices. These additional inferences demonstrate the tenuous character of any presumption that the class claims are "fairly encompassed" within respondent's claim.

Id. at 157-58 (footnotes omitted).

The plaintiffs' repeated theme is that defendant does not insure that the programs are employed consistently and in a non-discriminatory manner and that no one reviews the supervisors' decisions to make sure that the employees are being compensated fairly. It is not clear how higher level reviews of these performance evaluations could correct for this alleged oversight. The supervisors and managers are the ones who have observed the employees' performance. It is difficult to see how a supervisor of a supervisor could determine that such conclusion was wrong.

In conclusion, like the Magistrate Judge, we, too, have

serious reservations as to whether the named plaintiffs, who have distinct claims of discriminatory treatment by various supervisors in terms of promotions, work performance, assignments, and compensation, could meet the commonality and typicality requirements of Rule 23(a). However, as we stated previously, we need not decide this issue in light of our conclusion that plaintiffs have not met the requirements of any subsection of Rule 23(b).

II. Rule 23(b)(2), Fed. R. Civ. P.

In an effort to fall within the ambit of Rule 23(b)(2), plaintiffs' next objection to the Magistrate Judge's recommended ruling focuses on what they characterize as their requests for "significant injunctive relief." Pl.'s Obj. at 29. Under Rule 23(b)(2), class certification is appropriate where the defendant has acted or refused to act on grounds generally applicable to the class, thereby making injunctive or declaratory relief appropriate with respect to the class as a whole.

In their complaint, plaintiffs seek an award of money damages for lost wages, including back pay and fringe benefits, including 401(k) pension benefits, plus compensatory damages, punitive damages, costs and attorneys' fees. Additionally, they seek an order restraining defendant from retaliating against the plaintiffs or any class member. This is the only aspect of the plaintiffs' claim for injunctive relief which is clearly stated

in their complaint, yet there is no need for injunctive relief in this regard since the Title VII already prohibits such retaliation. See 42 U.S.C. § 2000e-3(a).

Plaintiffs, however, maintain that they are seeking significant injunctive relief, which predominates over their claims for money damages and which includes "dramatic reforms of the promotion and job posting system, new practices and procedures for evaluation and compensation, training for employees and supervisors, and corresponding declaratory relief identifying the illegal practices at issue." Pl.'s Obj. at 29-30. However, they do not even suggest how these changes are to be accomplished. Indeed, paragraph 20(g) of plaintiffs' complaint states that the Court must determine the proper procedures for replacing defendant’s policies and practices with those that are racially neutral in impact and effect.

Two possible procedures come to mind. One would be some form of objective test given to all employees being considered for pay increases and promotions. However, there have been substantial objections to uniform testing procedures, such as the Scholastic Aptitude Test, as being unfairly biased against blacks. Another possibility would be a civil service examination administered to employees eligible for promotion, with the promotions being handed out solely on the basis of the exam results. Anyone familiar with the civil service system knows that it does not necessarily give you the best workers, it simply

gives you those who have the best performance on the test. A final solution hinted at by plaintiffs is that there should be a review of all pay and promotion decisions to make sure that black employees proportionally get as many as are given to white employees. In essence, plaintiffs are proposing that the Court order a quota system for promotions, which would prejudice better-performing employees solely on the basis of their race. That approach was rejected by Congress in drafting Title VII, see 110 Cong. Rec. 1518, 5094, 5423, 6563, 6566, 7207, 14465, and has been repeated rejected by the Courts as unconstitutional. See Wards Packing Cove, 490 U.S. at 652; Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). This Court cannot order promotion quotas that confer a preference on individuals who have not been found to have been actual victims of illegal discrimination.

Despite plaintiffs' rather vague allusions to some form of injunctive relief, it is clear that what this case truly involves are claims for money damages, not only for the named plaintiffs in this action,[3] but for the entire class. There is nothing to indicate that the claims of the named plaintiffs are typical of those of the entire class. Indeed, each of the claims of the

[3] Two (2) of the original seven (7) plaintiffs in this case have settled with the defendant by accepting an early retirement package dropping their claims for damages in this action. That does not mean, however, that they cannot be witnesses in this case and their experiences considered as proof of the claims of the entire class.

named plaintiffs is quite distinct.[4] The fact that the named plaintiffs instituted this litigation suggests that their claims may be the strongest of the class. In addition, even if all of the named plaintiffs are found to have been discriminated against and that the discrimination against them resulted from subjective employment evaluations, it does not follow that all of the rest of the class members have been so affected. It would require more than 100 separate trials of the claims of each class member to determine if they were individually discriminated against and what damages each should recover, including back pay, front pay, 401(k) benefits, compensatory damages, and punitive damages.

Rule 23(b)(2) classes must be cohesive. Where a class

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[4] As pointed out in the Magistrate's recommended ruling, there is little similarity between the claims of the named plaintiffs. Robertson alleges discrimination in defendant's initial placement of him into a job grade level and in his promotions, compensation, and evaluations. Prioleau claims that he was subjected to a racially hostile work environment and that less experienced white employees received higher labor-grade level assignments than he did. Sanders alleges discrimination in his performance appraisal and that he was not selected as a group leader. Melva Johnson alleges discrimination in her supervisor's failure to promote her despite her superior appraisal ratings. Beverly Johnson claims discrimination in connection with her lay off, in the recent decline in her performance appraisal ratings, and being forced to take vacation time for bereavement leave. Howard challenges the job duties she was assigned as discriminatory. Leaphart alleges discrimination in his denial of a promotion and with respect to an unsatisfactory rating that he received on a performance appraisal. These named plaintiffs worked in different departments, for many different supervisors, held a variety of positions during their tenure with defendant, and were there during different time periods. Indeed, plaintiffs devote 27 pages of their complaint to describing the allegations of discrimination against each of these named plaintiffs throughout their varied work history with defendant.

suffers from a common injury and seeks class-wide relief, cohesion is presumed, i.e., the sameness in the relief sought binds the class. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 413 (5th Cir. 1998). But where, as here, the class seeks various forms of monetary relief, the class becomes less cohesive because of the need to examine individual damage claims. Id.

As the Magistrate Judge correctly concluded, the landscape of Title VII class certification was altered with the enactment of the damage provisions of the 1991 Civil Rights Act, 42 U.S.C. § 1981a. Prior thereto, Rule 23(b)(2) was a common vehicle for pattern and practice cases because Title VII allowed for very little relief other than injunctive and declaratory relief. However, with the availability of compensatory and punitive damages under the 1991 Act, the propriety of class certification is much more debatable and certainly requires greater scrutiny. See Miller v. Hygrade Food Products Corp., 198 F.R.D. 638, 640 (E.D. Pa. 2001). Compensatory damages now permitted under Title VII include relief for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). Punitive damages are allowed where the employer discriminated "with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). "These new remedies translate into a greater diversity and complexity of the issues to be adjudicated." Miller, 198 F.R.D.

at 641. Additionally, the 1991 Act provides that either party may demand a trial by jury where compensatory or punitive damages are sought in an intentional discrimination suit. 42 U.S.C. § 1981a(c)(1). This creates additional management concerns in the class action setting.

Citing Allison v. Citgo Petroleum Corp., the Magistrate Judge held, and we agree, that monetary damages are incidental only if they flow from liability to the class as a whole and are capable of determination by objective standards. If damages of the type sought here are to be awarded to members of the class, they must be determined on an individualized basis by a showing that the particular class member was entitled to a promotion or pay increase and did not receive it because of racial discrimination. That would also require a determination of when that discrimination occurred and what the salary differences were -- it would not be the same for everyone involved. These are not the type of damages that flow directly from liability to the class as a whole. Moreover, it would be unfair for those plaintiffs who have suffered the most severe discrimination for the longest period of time to have their damages divided equally among all class members. See Burrell v. Crown Central Petroleum, 197 F.R.D. 284, 289-90 (E.D. Tex. 2000).

The plaintiffs criticize the Magistrate's reliance on Allison v. Citgo Petroleum Corp., 151 F.3d at 415, concerning the analysis of the predominance question under subsection (b)(2).

They argue that a statement by the Fifth Circuit on a remand decision stripped that case of any precedential value. That argument has been flatly rejected by the Seventh Circuit. See Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 898-99 (7th Cir. 1999). Indeed, the Fifth Circuit has followed Allison's analysis of Rule 23(b)(2) in several subsequent decisions. See James v. City of Dallas, — F.3d —, 2001 WL 682089, at *5 (5th Cir. June 18, 2001); Bolin v. Sears Roebuck & Co., 231 F.3d 970, 975 (5th Cir. 2000); Washington v. CSC Credit Servs. Inc., 199 F.3d 263 (5th Cir.), cert. denied, 530 U.S. 1261 (2000). The Allison standard has also been endorsed by the Seventh Circuit in Lemon v. International Union of Operating Eng'rs, 216 F.3d 577 (7th Cir. 2000)), and the Sixth Circuit in Butler v. Sterling, Inc., 210 F.3d 371, 2000 WL 353502 (6th Cir. 2000)(unpublished decision). To date, Allison has not been disapproved of by any Circuit Court. See Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001); Rutstein v. Avis Rent-A-Car, 211 F.3d 1228, 1236 (11th Cir. 2000); Smith v. University of Washington, School of Law, 233 F.3d 1188, 1196 (9th Cir. 2000). Moreover, numerous district courts have followed the reasoning and holding of Allison. See, e.g., Miller, 198 F.R.D. at 640; Burrell, 197 F.R.D. at 286; Riley v. Compucom Sys. Inc., No. 3:98-CV-1876-L (N.D. Tex. Mar. 31, 2000). These cases clearly hold that certification under subsection 23(b)(2) is not appropriate unless the monetary relief sought is incidental to the plaintiff's

request for injunctive or declaratory relief. The injunctive relief requested here, as noted above, is nebulous, and monetary relief is the primary focus of this case.

Plaintiffs also seek punitive damages for members of the putative class. This would necessitate individualized proof of harm by each class member. In addition, they would have to show that the supervisor involved in any given decision acted with "malice or with reckless indifference to the federally protected rights" of that person. 42 U.S.C. § 1981a(b)(1); Kolstad v. American Dental Ass'n, 527 U.S. 526, 538 (1999). The class member would also have to show how liability for such conduct could be imputed to the company and that such conduct was not contrary to the company's good faith efforts to comply with the law.

Plaintiffs attempt to deal with the damages problems by proposing for the first time that the damages certified only be claims for back pay. This argument was never presented to the Magistrate Judge. However, in a case such as this, where multiple employment actions and decisions are challenged, the back pay claims would also require individualized inquiries similar to that which would be required for each compensatory damage and punitive damage claim. Rule 23(b)(2) permits only the certification of an action that is brought on behalf of a homogenous and cohesive class, not certification of particular types of damages. See Allison, 151 F.3d at 413. Moreover,

certification under subsection (b)(2) presumes that the class members suffer from a common injury that can be remedied by class-wide relief. Although there may be cases where back pay stems from a common injury and is readily calculable, this is not such a case. In this case, each back pay award is tied to one or more individualized discriminatory employment decisions relating to compensation, promotions, performance evaluations, etc., that occurred over a period of years. There would be few, if any, plaintiffs who would have similar back pay claims.

Accordingly, the Court agrees with the Magistrate Judge that plaintiffs' claims for monetary relief in this case predominate over their requests for injunctive and declaratory relief and, thus, certification under Rule 23(b)(2) is not appropriate.

III. Rule 23(b)(3), Fed. R. Civ. P.

Plaintiffs have also sought certification under Rule 23(b)(3), which is proper when the Court finds that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The two primary considerations under Rule 23(b)(3) are predominance and superiority. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623 (1997). Like

Rule 23(b)(2), certification under Rule 23(b)(3) is precluded where individual issues predominate. See Miller, 198 F.R.D. at 643. Superiority looks to the economies that can be achieved by using the class action device as opposed to individual trials. See Advisory Notes to Rule 23.

Plaintiffs have an unusual approach to these two obstacles to certification, suggesting that, first, the Court (or jury) should determine whether or not the defendant's promotion and evaluation system has a discriminatory impact on blacks for which the company is responsible. If it is found that there has been a racially discriminatory impact, the plaintiffs argue that the burden then shifts to the defendant to demonstrate why every black employee who did not get a promotion or pay increase was not entitled to it. Not only would that be very difficult and expensive for the defendant to prove but it would also place on defendant a burden far greater than it would have to bear in an individual Title VII case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

While we have focused primarily on the lack of commonality with respect to plaintiffs' damage claims, equally individualized concerns exist as to the liability issues. With the individual issues predominating over those common to the class, this case is similar to the settlement class rejected by the Supreme Court in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997)(involving asbestos claimants with individual exposure histories, suffering

various asbestos-related diseases, in which the Supreme Court rejected certification under Rule 23(b)(3)). In the instant case, there are scores, perhaps hundreds, of managers and supervisors who evaluated the class members and made promotion decisions. Assuming a few of them were in fact biased, that might well have resulted in the differential statistics on which plaintiffs' expert focuses. That individual bias would represent not be a company-wide pattern and practice of discrimination and might not even involve company responsibility. Plaintiffs, therefore, return to their earlier argument that it is up to the company to ensure that there have been no biased evaluations but, as noted, plaintiffs do not suggest any practical way of accomplishing this.

Additionally, plaintiffs argue that the fact that the various class members have different jobs and different supervisors is not an impediment to an employment discrimination class action. Per se it need not always be. If there is a common element in the employment practices which is dictated by the company and impacting upon all employees similarly, the fact that they are being applied by different managers or supervisors is not always critical. However, there is no uniform practice here. All that the plaintiffs can point to is the fact that there is a subjective element to the performance ratings that are being made by a number of supervisors and the company does nothing to see that blacks are getting the same percentage of

promotions as are whites. That is not a uniform practice that would have the same effect on all class members regardless of the supervisors and manager implementing it.

Thus, from the standpoint of both liability and damages, we agree with the Magistrate Judge that questions of fact are not common to the members of the class but would differ as to each class member both in terms of liability and damages. This brings us to the second prong of certification under Rule 23(b)(3), that being whether class certification is the superior mechanism for handling this litigation. It clearly is not.

The fact remains that, if the class is certified and the plaintiffs prevail on some elusive question of law common to the class, there are still individual liability issues to be tried as well as the individualized determination of back pay, front pay, compensatory damages, and possibly punitive damages. This would be an overwhelming task. The plaintiffs know this. They are not concerned with this because 99 times out of 100, once a class like this is certified, there never will be a trial. The defendant will have no choice except to settle and leave the problem of the distribution of the settlement proceeds to the plaintiffs' counsel.

Alternatively, the plaintiffs offer the possibility of bifurcation. The plaintiffs urge that the questions of liability and plaintiffs' claims for injunctive relief could be tried first. That could occur. However, it would be a somewhat

different trial than the plaintiffs envision. If there were a trial of liability and injunctive claims, it would begin with a determination of whether plaintiffs have shown a disparate impact based on race because of any identified racially neutral employment practices. The second issue would then be whether these employment practices are job-related and consistent with business necessity. (On that issue the defendant would probably prevail but this, too, is a triable issue.) If it is concluded that there is a better means of evaluating employees which could and should have been utilized, then the next question would be whether a particular class member was entitled to a promotion but did not receive it because of racial discrimination. At this point, however, this case can no longer be considered on an entire class basis. Even assuming that all of the named plaintiffs prove their particular claims (or most of them do), which would be of some help to other class members, it certainly does not determine that all of the class members have been discriminated against and were entitled to a promotion or pay increase but did not get one. An additional problem with bifurcation is that it could run afoul of the Seventh Amendment since it is unlikely that one jury could hear all aspects of these bifurcated (or trifurcated) trials.

We could also try the claim that the subjective manner in which performance evaluations were made has created a bias against the named plaintiffs. (It would not necessarily follow

that this bias would be present as to other putative class members.) Of course, if that issue were tried separately and the trier of fact was to agree with the plaintiffs' arguments, and some form of injunctive relief were to be ordered by the Court, we would assume that that injunctive relief would be effective as to all employees of the defendant, thereby negating the need for a class in that regard. However, addressing the discretionary aspect of performance and pay reviews would not resolve all of the situations complained about by the plaintiffs. They object to a broad scope of employment decisions including entry level job categorizations, negative performance appraisals, failure to promote where there has been a positive performance appraisal, requiring plaintiffs to take certain types of leave, as well as claims concerning racially derogatory remarks and other individually encountered events. At present, each supervisory decision maker carries out his decisions within a de-centralized system and it is difficult to envision how injunctive relief could adequately address all of the complaints of the plaintiff.

As the Court held in the very recent case of Reap v. Continental Casualty Company, 199 F.R.D. 536 (D.N.J. 2001),

> [plaintiff's] class claims seek to group together many unrelated employment decisions made by many individual supervisors against many individual plaintiffs without alleging that [defendant] intended to use its delegation policy to discriminate against women or older women in its work force, that [defendant] encouraged local managers to discriminate against women or older women, or

> that [defendant] condoned such discrimination. Instead [plaintiff] merely alleges that [defendant's] policy of delegating employment decisions to local supervisors has resulted in such discrimination taking place. Thus, in order to determine whether a class member was subjected to discrimination, the fact finder would have to make individualized inquiries regarding the nature of each class member's claim to determine whether she was the victim of intentional discrimination. These individualized fact issues would predominate during the liability phase of the trial.

Id. at 549. The Court further found that, during the damages phase of the trial, individual issues would predominate over common ones because the class members were subjected to different forms of discrimination in different divisions of the company by different supervisors for varying durations of time. Id. The Court noted that an additional consideration that made class certification inappropriate was "the highly individualized nature of the determination of disparate treatment and damages . . . [which] makes the interest of individual class members in individually controlling the prosecution of their claim, rather than having it controlled by class representatives," a very strong factor weighing against certification. Id. at 550. Accordingly, finding that the plaintiffs' requested damages predominated over their request for injunctive and declaratory relief and because individual issues predominated over common ones, the Court held that the requirements of Rule 23(b)(2) and (b)(3) had not been met. Additionally, the Court found that

class adjudication of these claims was inferior to alternative methods of adjudication. Id. That is the situation in this case, as well.

Therefore, the Court agrees with the Magistrate Judge's ruling that class certification under subsection (b)(3) is not appropriate because the class, as proposed, meets neither the predominance nor the superiority requirements of this Rule.

CONCLUSION

The Court, having considered all of the objections of the plaintiffs, adopts the report and recommendation of the Magistrate. In addition, after a complete and independent review of the record in this case, this Court DENIES the plaintiffs' motion for class certification.

SO ORDERED.

Dated: July 5, 2001.
Waterbury, Connecticut.

_____/s/_____
Gerard L. Goettel
United States District Judge

RECOMMENDED RULING ON MOTION FOR CLASS CERTIFICATION

This case was brought in June,1997 by seven individuals on behalf of themselves and 174 salaried, African-American employees of defendant Sikorsky Aircraft Corporation ("Sikorsky"). Plaintiffs' First Amended Complaint ("Compl.") seeks monetary damages and declaratory and injunctive relief under Section 1981

of the Civil Rights Act of 1871, as amended in 1991, 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964, as amended in 1991, 42 U.S.C. §§ 2000e, et seq. The complaint alleges racial discrimination in compensation and promotions, and challenges certain programs utilized by Sikorsky, including the Performance Evaluation Program ("PEP"), the Merit Budget Program ("MBP"), the promotion system, and the Leadership Development Review program. Plaintiffs now seek certification of the putative class, pursuant to Fed. R. Civ. P. 23. For the following reasons, plaintiffs' motion **(Doc. #81)** is DENIED.

BACKGROUND

The plaintiffs are now seeking certification of a class of 174 African-American employees who worked in Sikorsky's facilities in Connecticut and elsewhere between June 19, 1994 to present.(Compl. ¶ 22) With one exception, the named plaintiffs are all current employees of Sikorsky.

Sikorsky divides its employees into various labor grades, which include a professional group (Grades 41-47); a group of supervisors and managers (Grades 47-48); a group of managers (Grades 49-51); and an executive group (Grades L3-L1). Two-thirds of the putative class are in labor grades 41-51.

Under the Merit Budget Program ("MBP"), each salaried employee is assigned a labor grade. Salaries within the labor grade vary widely. According to Sikorsky, an employee's salary is a function of the position for which the employee is hired and subsequent increases made under the Merit Budget Program. On an annual basis, employees are able to receive raises between 3-10%. The plaintiffs assert that Sikorsky allots a certain budget to each department to use for merit increases; each manager then has discretion to allocate this "merit budget" pool among the employees he or she supervises. The discretion includes which employees receive increases and the amounts of the increases. While acknowledging that Sikorsky's Human Resources Department distributes company-wide guidelines setting forth factors to be

considered when determining an employee's compensation, the plaintiffs contend that Sikorsky actually does nothing to ensure that the MBP is applied consistently, fairly, and in a non-discriminatory manner. (Pls. Mem. of 8/9/99 at 18).

Sikorsky uses another program which is tied to the MBP, the Performance Evaluation Program ("PEP"), to evaluate each employee's job. Annually, an employee's performance is rated as either Exceptional (E), Meets Requirements (M), Developing (D), or Unsatisfactory (U). Moreover, each salaried job is itself evaluated on certain factors, such as education, experience, complexity of duties, and supervision received. Managers are given a "rating kit" to conduct these evaluations.

According to the plaintiffs, Sikorsky does nothing to ensure that the evaluation program does not disadvantage African-American employees. Plaintiffs allege that no one at Sikorsky oversees the programs to determine whether or not they disparately impacted African-American employees. Plaintiffs claim disparate impact and disparate treatment and attempt to back up those claims with statistical evidence.

Promotions at Sikorsky are divided into two categories: they are either job ladder promotions (movement to a higher labor grade) or non-job ladder promotions. Job ladder promotions depend on the availability of a position, whereas non-job ladder promotions are posted on the company's computerized Job Posting System. The plaintiffs argue that the job ladder promotions

carve out a loophole to the posting requirement that is so vast that the result is that supervisors have "unfettered discretion over which jobs to post." (Compl. ¶ 33). Plaintiffs further contend that there are no written criteria or instructions governing what a supervisor may consider when making his or her decisions regarding promotions, and that this has a disparate impact on African-Americans and results in disparate treatment.

The Leadership Development Review is a program used to identify talented individuals to fill key positions now and in the future; and to give those individuals training and experience to enable them to advance. The plaintiffs maintain that the employees in the Leadership Development Review program receive the most senior-level positions. To be considered for the Leadership Development Review program, an employee must be identified by a manager as "high potential" or a "high performer." Managers are given forms to identify and rate candidates. The plaintiffs assert that there are no safeguards to ensure that African-Americans are not disadvantaged by the system.

The individual named plaintiffs' allegations encompass diverse claims of discriminatory and racially hostile conduct by both supervisors and colleagues at Sikorsky. Named plaintiff Steven Robertson alleges discrimination in Sikorsky's initial placement of him into a job grade level. (Compl. ¶ 43). Robertson further alleges discrimination Sikorsky's decisions regarding his

promotions and evaluations. (Compl. ¶ 46, 48).

Named plaintiff Keith Prioleau was allegedly forced to endure a co-workers use of a racially derogatory comment regarding African-Americans, albeit not directed at Mr. Prioleau. (Compl. ¶ 29(d)(i)). Mr. Prioleau alleges that he did not receive the positions and compensation to which he was entitled because of his race. (Compl. ¶ 57). Mr. Prioleau also alleges that less experienced Caucasian employees received higher labor grade level assignments and earned more than him. (Compl. ¶ 61).

Named plaintiff Kevin Sanders alleges that he was discriminated against in the context of his performance appraisal. (Compl. ¶ 68). Mr. Sanders also alleges discrimination in that he was not selected as a Group Leader by a group of co-workers. (Compl. ¶ 73-74).

Named plaintiff Melva Johnson alleges discrimination by her supervisors in their consideration of her for promotions. (Compl. ¶ 87). Ms. Johnson further alleges that although her appraisal ratings have been "superior" she has not been promoted to a grade level equivalent to her Caucasian co-workers who perform the same functions. (Compl. ¶ 91).

Named plaintiff Beverly Johnson alleges discrimination in Sikorsky's decisions to lay her off temporarily (Compl. ¶ 95), and to place her in labor grade level lower than Caucasian and Hispanic employees doing comparable work. (Compl. ¶ 94-95). Ms. Johnson alleges that her performance evaluations were at one time

"superior" but have more recently and subsequent to a promotion been only "competent." (Compl. ¶ 96). Ms. Johnson also alleges that she was discriminatorily forced to use her vacation time during a period of bereavement. (Compl. ¶ 97).

Named plaintiff Sylvia Howard alleges discrimination in that her job duties were lessened by a Caucasian supervisor (Compl. ¶ 105), and that she was criticized in a performance appraisal (Compl. ¶ 106).

Named plaintiff Harry Leaphart alleges discrimination in that he was not promoted to a labor grade equal that of Caucasian employees performing the same work (Compl. ¶ 110) and he further alleges he received a rating of "unsatisfactory" on his performance appraisal (Compl. ¶ 112).

The named plaintiffs' declarations involve allegations against different Sikorsky decision makers in a variety of circumstances. Moreover, the claims involve comparisons of plaintiffs' qualifications with those of different co-workers.

In their prayer for relief plaintiffs seek a declaratory judgment finding that Sikorsky illegally discriminated against them. They also seek back pay, lost 401K and pension benefits, compensatory and punitive damages, attorney's fees and costs, and injunctive relief against any retaliatory acts by Sikorsky against the plaintiffs.

The primary issue is whether the plaintiffs meet Rule 23's requirements merely by alleging that the company-wide policies

delegate to supervisors substantial discretion to make decisions regarding compensation and promotion and that these decisions are made in a racially discriminatory manner having a disparate impact on African-Americans and that result in disparate treatment.

DISCUSSION

For their class to be certified, plaintiffs must satisfy all of the requirements of Rule 23(a) and must fit within one of the categories of Rule 23(b). See Marisol v. Giuliani, 126 F.3d 372, 375-76 (2d Cir.1997). When deciding a motion for class certification, the only issue is whether the requirements of Rule 23 have been met, and not whether the plaintiffs have stated a cause of action or will prevail on the merits. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974). Nevertheless, the Supreme Court has cautioned that the trial court must conduct a "vigorous analysis" to determine whether Rule 23's requirements have been satisfied. General Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982). Thus, it is sometimes necessary for the district courts to "probe behind the pleadings before coming to rest on the certification question." Id.; see Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) ("class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action").

When considering a motion for class certification, courts should consider the allegations in the complaint as true. See Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 661 n. 15 (2d Cir. 1978) ("it is proper to accept the complaint allegations as true in a class certification motion"). Yet, a court may consider material outside the pleadings in determining

the appropriateness of class certification. See Kaczmarek v. International Business Machines Corp., 186 F.R.D. 307, 311 (S.D.N.Y. 1999) (citing Sirota v. Solitron Devices, Inc., 673 F.2d 566, 571 (2d Cir. 1982)).

The four requirements of Rule 23(a) are that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir.1999); Marisol A. v. Giuliani, 126 F.3d 372, 375 (2d Cir.1997).

Additionally, class actions may be maintained only if the requirements of Rule 23(b) have been met. Rule 23(b) permits class actions in situations where: (1) prosecution of separate actions by individual parties would create a risk of either inconsistent adjudications or would be dispositive of the interest of those members not parties to the adjudication; (2) defendants have acted or refused to act on grounds generally applicable to the class; or (3) questions of law or fact common to members of the class predominate, and a class action is superior to other available methods for adjudication. See Fed. R. Civ. P. 23(b); Caridad, 191 F.3d at 292; Marisol A., 126 F.3d at 376.

A. Rule 23(a)

The Court will not do a Rule 23(a) analysis because it finds that Plaintiffs do not satisfy Rule 23(b), and class certification is therefore inappropriate. Despite Caridad[5], the Court has serious reservations about whether Plaintiffs satisfy the Rule 23(a) "commonality" requirement in light of the differing job levels, decision making criteria and decision makers at issue in this case. See, Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 Lab. Law. 415, 434 (2000).

B. Rule 23(b)(2)

The Court turns to the question of whether or not the plaintiffs' case satisfies one of the available categories under Rule 23(b). See Fed. R. Civ. P. 23(b). Plaintiffs argue for certification under both Rule 23(b)(2) and Rule 23(b)(3).

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[5]The Court notes that Caridad has been cited in this District as standing for the proposition that the commonality requirement of Rule 23(a) may be satisfied where the statistical evidence presented by Title VII plaintiffs showed significant disparities in an employer's treatment of African-American and white employees. See Cohn v. Massachusetts Mutual Life Insurance, Co., 1999 WL 781730,*7 n.29.(citing Caridad, 191 F.3d at 292-94). The Court notes defendants contention that the plaintiffs' statistical evidence is not statistically significant because, among other things, the plaintiffs' expert neglected to control for factors such as cross departmental differences in promotion eligibility. (Def. Mem. of 9/3/99 at 43-44). However, as the Second Circuit instructed in Caridad, motions for class certification are not the appropriate venue for "statistical dueling." Caridad v. Metro-North Commuter R.R., 191 F.3d at 292 (2d Cir. 1999).

Rule 23(b)(2) permits certification if the action is one that is “appropriate” for final injunctive relief or declaratory relief[6] The analysis of when an action is “appropriate” for final injunctive relief or declaratory relief requires an examination of the relief sought by the plaintiffs and the compatibility of that relief with the procedural safeguards established to protect the interests of absent class members.

(i) Relief Sought by Plaintiffs

In their prayer for relief, plaintiffs seek the entry of a judgment that "the acts and practices of defendant complained of herein are in violation of the laws of the United States." (Compl. at p. 44). They also seek an award, for the named plaintiffs and the class, of lost wages, including fringe benefits and back pay, "including, without limitation, any lost benefits that would have otherwise been included in plaintiffs' 401(k) pension plans, which resulted from the illegal discrimination." Id. Next, they seek, for the named plaintiffs and the class, an award of compensatory and punitive damages, costs of the action, including the fees and costs of experts, and reasonable attorneys' fees. Id. Finally, the seek an order "restraining Sikorsky from any retaliation against any plaintiff

[6]A class action may be maintained under Rule 23(b)(2) if, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

or Class member for participation in any form in this litigation" and "such other and further relief as this court finds necessary and proper." Id. Since it is apparent from their prayer for relief that plaintiffs seek more than merely injunctive relief but also monetary damages, it is incumbent upon the court to analyze whether or not this case is still a type of case which can be certified as “appropriate” for injunctive relief.

(ii) Effect of Monetary Damages on 23(b)(2) Class Certification

With respect to a Rule 23(b)(2) class action, plaintiffs assert that such a class action is appropriate where--as here--plaintiffs allege that the employer's procedures and practices have a discriminatory effect on the entire class. See Selzer, supra, 112 F.R.D. at 180. Indeed, certification 23(b)(2) class pursuant to Title VII of the Civil Rights Act was a commonly accepted class action (so long as the requirements of Rule 23(a) were met). See 3B Moore's Federal Practice, ¶ 23.40[2], at 23-2391 (2d ed. 1985); Fed. R. Civ. P. 23 Advisory Committee's Note (1966) (stating that illustrative cases under Rule 23(b)(2) include "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration"); see also Selzer, 112 F.R.D. at 179.

Nevertheless, it can not be overlooked that the landscape of

Title VII 23(b)(2) class certification was altered by the enactment of the Civil Rights Act of 1991. Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 896 (7th Cir. 1999). As a consequence of that legislation, plaintiffs in Title VII cases are now entitled to compensatory and punitive damages and a jury trial.

The availability of compensatory and punitive damages as well as the right to a jury trial affect the "appropriateness" of certification under 23(b)(2). "[I]n actions for money damages class members are entitled to personal notice and an opportunity to opt out." Id. citing Ortiz v. Fibreboard Corp., 527 U.S. 815 119 S.Ct. 2295, 2314-15, 144 L.Ed.2d 715 (1999). Rule 23(b)(2) has no requirement for notice and an opportunity to opt out therefore, generally, certification pursuant to Rule 23(b)(2) is inappropriate if monetary damages is the exclusive or predominate relief that is sought in an action. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 413 (5th Cir. 1998). If, however, "money damages are merely incidental to plaintiff's request for injunctive or declaratory relief, class actions may be certified under Rule 23(b)(2)." 5 Moore's Federal Practice, ¶ 23.43[3][a] (3d ed. 2000).

In Allison, the Fifth Circuit was confronted with an employment discrimination action seeking both monetary damages and injunctive relief under Title VII in which the plaintiffs sought certification of a class. The Allison court refused to

certify the class under 23(b)(2) because it found that monetary damages predominated and were not merely incidental. Monetary damages are considered incidental only if they flow directly from liability to the class as a whole and are capable of computation by means of objective standards. Allison, 151 F.3d at 415. Damages are not incidental if computation depends upon the subjective differences of each class member's circumstances or "require[s] additional hearings to resolve the disparate merits of each individual's case..." Id.

Here, while the plaintiff's have sought some class wide declaratory and injunctive relief, the essence of their remedy and the issues that would predominate in any damages analysis are the monetary damages suffered by the individual employees in their lost promotions, training opportunities, pension benefits and other fringe benefits. Even if plaintiffs prevailed on their pattern and practice case, an award of monetary damages would clearly not be incidental and would not flow merely from an award of injunctive or declaratory relief; and instead, would relate to the claims of each individual plaintiff.

This court agrees with Judge Easterbrook's analysis that "when substantial damages have been sought, the most appropriate approach is that of Rule 23(b)(3), because it allows notice and an opportunity to opt out." Jefferson v. Ingersoll at 898. For the foregoing reasons the plaintiffs motion for certification pursuant to 23(b)(2) is denied.

C. Rule 23(b)(3)

Additionally, plaintiffs argue that a class may be maintained under Rule 23(b)(3). Certification of a class under 23(b)(3) is appropriate if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The predominance requirement of Rule 23(b)(3) is distinct from the initial 23(a) inquiry into "commonality" and is not merely a quantitative inquiry into the number of common issues. See 5 Moore's Federal Practice, ¶ 23.46[1] (3d ed. 2000).

In this case, the named plaintiffs argue there are several factual and legal questions common to all class members, including: "(1) whether Sikorsky's promotion system and Merit Budget Program are entirely subjective and discriminate against African-Americans; (2) whether Sikorsky's Performance Evaluation Program is entirely subjective and applied in an inconsistent manner so that it discriminates against African-Americans; (3) whether Sikorsky's racially discriminatory policies and practices caused a disparate impact and/or treatment of the members of the Class in violation of Title VII and Section 1981." (Pls.' Mem. of 8/9/99, at 34 n.15; see also Compl. ¶ 20). Plaintiffs argue that these issues of law and fact common to the class predominate over

any particular individual's claims and that "the mere existence of potential individual issues of proof will not defeat predominance" under Rule 23(b)(3). (Pls.' Mem. of 8/9/99, at 39). Plaintiffs further argue that if the case is not tried as a class action, many individual members may be denied effective relief because they will be unable to afford the sophisticated statistical analyses necessary to support their claims.

On the other hand, defendant, relying in part on Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), argues that the resolution of liability issues will depend on the facts and circumstances of each individual plaintiff's experience. Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products, Inc. v. Windsor, 521 U.S. at 623. Defendant is correct that individual issues and differences regarding performance appraisals, promotions, grade levels, and supervisory decision making will predominate because Sikorsky will be permitted at trial to adduce evidence on these topics regarding each individual. Additionally, defendant asserts that the determination of damages issues turns on each individual plaintiff's claim, particularly with respect to claims for emotional distress and punitive damages. They are correct. Moreover, with respect to wage and benefits there are also significant individual issues.

While each instance of race discrimination need not be manifested under precisely the same set of facts in order to find common issues of fact or law, this action is notable for the many divergent manifestations of discrimination alleged by the plaintiff. Plaintiffs' complaint encompassed named plaintiffs with years of service which varied from only a few years to decades. The named plaintiffs' declarations complained of practices and policies that spanned multiple job categories, departments, labor grade levels with alleged discriminatory acts which were manifested in a broad scope of employment decisions: from entry level job categorization, to negative performance appraisals to positive performance appraisals without promotions, to the withholding of promotions or the granting of the promotions but withholding of pay raises to incidents alleging use of racially derogatory remarks in the presence of a named plaintiff. And to even further individualize each of the named plaintiffs' circumstances, different supervisory decision makers carried out these actions within a decentralized system.

Plaintiff relies heavily on the recent Second Circuit decision in Caridad in making a generalized argument that "commonality" of claims exists in this action. (Pl. Mem. of 9/30/99 at p.4). However, the court in Caridad did not decide the question of whether or not the plaintiffs claims satisfied 23(b)(3) but was limited to whether the plaintiff had established commonality and typicality under 23(a). Caridad v. Metro-North

Commuter R.R., 191 F.3d 283 (2d Cir.1999).

In order to certify a class under 23(b)(3), the plaintiffs must at a minimum show "comparable misconduct to show common issues predominate under 23(b)(3)." Cohn v. Massachusetts Mutual Life Insurance, Co., Nos. 96-1257, 97-1614, 1999 WL 781730, *7 (D.Conn. August 27, 1999)(finding predomination requirement not satisfied due in part to the numerosity of actors). Even in a case cited by the Plaintiff in support of their motion, the standard for certifying a class was the conduct complained of be "substantially similar." Warnell v. Ford Motor Company, Nos. 98C1503, 98C5287, 1999 WL 967518, *3 (N.D. Ill. October 15, 1999). Here, the Court finds that individual issues predominate over those that may be common to the putative class members and that plaintiffs have not met their burden under Rule 23(b)(3).

D. Hybrid and Bifurcated Certification

(i) Bifurcation and the Seventh Amendment

Plaintiffs in their brief invite this Court to consider a "routine" bifurcation of the proceedings into a liability phase and a damages phase. It is the Plaintiffs' suggestion that this would circumvent the problem that individual issues predominate. (Pls. Mem. of 9/30/99 at 35). An action must be considered as a whole in order to determine whether or not the predominance requirement has been satisfied. Cohn v. Massachusetts Mutual Life Insurance, Co., Nos. 96-1257, 97-1614, 1999 WL 781730, *7

(D.Conn. August 27, 1999). Even if this Court found that bifurcation of this case into liability and damages phases served the ends of trial manageability and judicial economy, which it does not, there still remains the strictures of the Seventh Amendment.[7] The Seventh Amendment requires that the same issues not be decided by successive juries in a case. Blyden v. Mancusi, 186 F.3d 252, 268 (2d Cir. 1999).

Here, even if the court permitted certification of the class for the limited purpose of liability a second phase damages jury would have to undoubtedly re-examine issues considered by the liability jury. The nature of employment discrimination claims inevitably require a fact finder seeking to determine whether an individual was actually damaged by a discriminatory policy or practice to assess whether the defendant discriminated against a particular plaintiff. It is conceptually possible for a jury to find that Sikorsky's policies and practices did have a discriminatory impact but that individual class members were not discriminated against. This court agrees with the defendant's contention that at a second "damages" phase the "damages" jury would in effect be reconsidering whether a pattern and practice of discrimination exists at Sikorsky.(Def. Supp. Mem. of 11/9/99

[7]"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rule of common law." U.S.Const. amend. VII.

at p.8).

(ii) Hybrid Class Certification

Other courts have considered the possibility of so called "hybrid" certification in instances where a putative class does not satisfy the requirements of 23(b)(2) but which the court deems worthy of exercise of its plenary authority under Rule 23(d)(2)[8]. Under hybrid certification a court permits certification under 23(b)(2) despite the request for non-incidental monetary relief and requires full 23(b)(3) notice and opportunity to opt-out for absent class members for either the entire case or, if bifurcated, the damages phase. See generally, Jefferson v. Ingersoll Int'l, Inc., supra, 195 F.3d at 896; Robinson v. Sears, Roebuck and Co., 2000 U.S.Dist. LEXIS 9982, *74, 4:98cv00739 SWW, (E.D.Ark. July 3, 2000); Lemon v. Int'l Union of Operating Engineers, Local No. 139, AFL-CIO, 216 F.3d 577 (7th Cir. 2000); see also Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 Lab. Law. 415, 478 (2000). As Judge

[8]"In the conduct of actions to which this rule applies, the court may make appropriate orders:...(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action." Fed. R. Civ. Proc. 23(d)(2).

Easterbrook noted in Jefferson a court may certify a class action "under Rule 23(b)(3) for all purposes or bifurcate the proceedings-- certifying a Rule 23(b)(2) class for equitable relief and a Rule 23(b)(3) class for damages ***(assuming that certification under Rule 23(b)(3) otherwise is sound, a question we do not broach)"*** Jefferson, supra, 195 F.3d at 899 (emphasis not in original). Here, the Court finds that certification under 23(b)(3) is not sound and therefore does not consider the hybrid option discussed hypothetically in Jefferson.

CONCLUSION

For the foregoing reasons, the Court recommends DENYING plaintiffs' motion for class certification **(Doc. #81)**.

Any objections to this recommended ruling must be filed with the Clerk of the Court within ten (10) days of the receipt of this order. Failure to object within ten (10) days may preclude appellate review. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; D. Conn. L. Civ. R. 2 for Magistrate Judges; FDIC v. Hillcrest Assocs., 66 F.3d 566, 569 (2d Cir. 1995).

So ordered this 18th day of September 2000, at Bridgeport, Connecticut.

_____/s/_____
William I. Garfinkel
United States Magistrate Judge